Filed 2/23/05 Kimberly R. v. Sup. Ct. CA5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

KIMBERLY R., Petitioner, v. THE SUPERIOR COURT OF KERN COUNTY, Respondent; KERN COUNTY DEPARTMENT OF HUMAN SERVICES et al., Real Parties in Interest.	F046636 (Super. Ct. Nos. JD104969 & JD104970) **OPINION**

THE COURT[*]

ORIGINAL PROCEEDING; petition for extraordinary writ review.

Nanette J. Stomberg for Petitioner.

No appearance for Respondent.

Bernard C. Barmann, Sr., County Counsel, and Susan M. Gill, Deputy County Counsel, for Real Party in Interest.

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[*] Before Vartabedian, A.P.J., Cornell, J. and Dawson, J.

Petitioner, Kimberly R., is the mother of dependent adolescent children, Natalie and Andrew. She challenges respondent court's dispositional order denying her request as the children's noncustodial, nonoffending parent for custody under Welfare and Institutions Code section 361.2.[1] She contends the court's denial was erroneous because there was insufficient evidence to support the court's finding that placement with her would be detrimental to the children's interests. Real party in interest, Kern County Department of Human Services (the department), which advocated such a placement in the trial court, does not disagree. On review, we will grant relief by setting aside the detriment finding and directing the court to grant petitioner's request and place the children with her.

PROCEDURAL AND FACTUAL HISTORY

In the summer of 2004, 13-year-old Natalie and her 11-year-old brother Andrew were part of a blended family. They lived with their father Joseph, his third wife, her teenage son from a prior relationship, and the couple's two younger children. Regrettably, Natalie and Andrew's father was physically abusive and his apparent alcoholism only worsened his abusiveness. He physically and psychologically abused Andrew, his wife, and her teenage son. When the department investigated the situation in the family home, information also developed that the father may have sexually abused Natalie. It was undisputed that the father and daughter sometimes slept together. There was also information that yet another son of the father's, who was now dead, had been sexually molested by a third party and subsequently that son had sexually molested Natalie, Andrew and others.

Based on the father's physical and psychological abuse as well as his alcohol problem, the department initiated dependency proceedings as to Natalie and Andrew.

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

The court thereafter exercised its dependency jurisdiction over the children under section 300, subdivision (b).

In the meantime, the department located and interviewed petitioner. She reported she and the children's father had been divorced since 1993. The father, whom she labeled as an alcoholic, had been physically abusive towards her. She was aware of the father's abuse of his current wife. Petitioner admitted she had a history of using methamphetamine and alcohol. However, she had been sober since April 6, 2002. She also explained that while both she and the father shared legal custody of the children, he had sole physical custody of them. Although she had reasonable visitation rights, she claimed the father would only allow her to see Natalie and Andrew when he wanted her to see them. She asked to visit with the children and the department in turn scheduled weekly visits.

As for petitioner's current circumstances, she had a 16-year-old daughter who lived with her. She had four other children, each older than Natalie and Andrew. Petitioner was also in a lesbian relationship and lived with that woman.

In speaking with Natalie and Andrew, the department learned that they were acquainted with and had contact with petitioner. However, they did not see her often. Andrew expressed a desire to see his mother and had in fact asked his father months earlier to go live with her. Natalie at the outset did not want to live with petitioner because of her lesbian relationship. For that matter, Natalie was very protective of her father. She denied her father was abusive.

As part of its dispositional plan for Natalie and Andrew, the department recommended the court remove them from their father's custody and place them with petitioner subject to family maintenance services for her and reunification services for the father. He was then in custody on spousal abuse charges. The children were in separate foster homes.

In support of its recommendation that the court place the children with petitioner, the department's social worker reported petitioner had requested placement of her children and was cooperative with the department. She agreed to participate in sexual abuse awareness counseling as well as family counseling with her children. The department's background investigation on petitioner revealed she had no criminal record aside from one Vehicle Code conviction for driving without a license. Although the children had a substantial history with Child Protective Services (CPS) while in their father's home, the department apparently had no information regarding a CPS history for petitioner. A child abuse central index inquiry to the state department of justice disclosed no information regarding petitioner. A check of family law court records revealed petitioner, in 1992 and 1994, made attempts to obtain physical custody of and more specific visitation rights as to Natalie and Andrew. In particular, a mediation report prepared for the court in 1994 revealed the parents could agree on virtually no terms so far as petitioner maintaining a relationship with her children was concerned.

The social worker conducted a similar background investigation on petitioner's partner. She too had one Vehicle Code conviction, for allowing an unlicensed person to drive her car. The partner had no biological children but was the legal guardian to two children who lived with her. CPS had received several referrals on behalf of those children. However, in the department's estimation, Natalie and Andrew would not be placed at risk with petitioner's partner living in the home. The child abuse central index inquiry to the state department of justice disclosed no information regarding petitioner's partner.

In addition, the social worker visited the petitioner's home, which it characterized as adequate. It was cluttered but possessed no immediate safety hazards for Natalie and Andrew based on their ages. The home was a four-bedroom home, including a converted garage. Andrew would have his own room while Natalie would share a large bedroom with her older half-sister and the partner's female ward. That bedroom had two sets of

bunk beds and each child would have her own bed. The father of petitioner's partner also lived in the home.

At the dispositional hearing, Natalie and Andrew's father objected to the department's recommendation that the court place the children with petitioner. The father testified he opposed the placement on several grounds. He cited the following concerns. Petitioner had had limited contact with the children. The children had "come back hurt" from visits. He claimed there was no supervision in the home. He disapproved of the fact that petitioner was "engaged in an alternative lifestyle." He did not like petitioner's partner whom he believed was slanderous. He also was worried about his children's education.

Petitioner next took the stand. She explained that the father had obtained sole custody when he filed for dissolution and she defaulted. She explained she was naïve as to the consequences of her inaction. Then when she tried to visit the children, she believed she was essentially at the father's mercy. She apologized for her lack of aggressiveness in asserting her visitation rights and admitted she was wrong. She claimed it would have been a fight. She was also purportedly tired of being under the father's rule. She denied the father's claim that the children were ever hurt while visiting with her. She could not think of any reason why her home would not be a safe environment. As for the father's concern about education, petitioner assured the court that her children would go to school.

When questioned about her relationship with her partner, petitioner testified they had known each other for over a decade and had lived together in a house they were renting for two years. The partner received Supplemental Security Income (SSI) benefits. Petitioner assumed her partner had a mental health problem in order to receive such benefits although she did not believe her partner had a mental health problem. The partner also apparently received kin-gap benefits for her wards.

Petitioner was not employed outside the home. She was paid part-time by an entity called "IHS" for providing end-of-life care to her partner's 70-year-old father who was bedridden and suffered from renal failure. Petitioner also received Aid To Families With Dependent Children (AFDC) benefits for her teenage daughter who lived with her. She did not pay child support for Natalie and Andrew.

Last, the department called its social worker to testify with respect to her placement recommendation. Regarding the background checks she conducted and relevant to this appeal, the social worker testified she found CPS records dating up to 2004 for the female ward of petitioner's partner. The social worker found one substantiated allegation on the teenager against petitioner's partner but did not remember its content. The judge questioned why there was nothing about this in the social worker's report. She replied she did not go into the specifics of that allegation in drafting the social study because it did not appear to pose a risk to the children.

The judge then asked why he did not see anything in the report about "this relationship between the mother . . . and [her partner]." When advised that the relationship was described in the jurisdictional report to the court, the judge next questioned the dispositional report's reference to the names of petitioner's partner and the man who was in fact the father of petitioner's partner. "I presumed that [those individuals], perhaps, were the man and wife in the home." The judge in turn characterized the report as "very misleading." "I'm finding out all kinds of things that I think should have been in that report."

He then directed county counsel to inquire about the partner's SSI benefits. The social worker admitted she did not ask the partner why she was on SSI but rather assumed it was because the partner was diabetic and had her foot partially amputated. Although she was not necessarily wheelchair bound, the partner did use a wheelchair in the home. Based on the petitioner's testimony, the social worker would like to ask why

the partner was receiving SSI benefits.[2] The social worker nonetheless continued to recommend placement of the children with petitioner. When the judge interjected "[r]egardless of what the mental condition is of her partner in the house?" the social worker replied:

> "I guess it's because I've had numerous contacts with both the mother and [her partner] and she has not displayed any signs of having a severe mental illness that would cause any risks to these children."

The social worker had met the partner twice in the home, that day in court, and five or six times during visits.

On cross-examination, the social worker testified she had not drug-tested petitioner. She believed the petitioner's sobriety claim because petitioner did not seem to demonstrate any signs of current use, her children were cared for, and her house was clean. The social worker did recommend random testing for petitioner, however, as part of a family maintenance plan.

The father's counsel next questioned why the social worker did not go into detail in her report about petitioner's relationship with her partner. The social worker responded:

> "The department cannot discriminate against a parent for being a lesbian, homosexual, for ethnic backgrounds. [¶] If a parent is with a man for two months, as long as that individual clears, we cannot discriminate against that parent."

This response led the judge to interject:

> "[Y]ou're not discriminating against the parents. You're discriminating against the children when you don't consider what is in their best interest. [¶] I mean, did you consider it at all if it was in the best interest of the children in this instance?"

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[2] The court appeared to agree to the social worker making such an inquiry during an upcoming recess.

When the social worker replied, "[b]eing a homosexual is not illegal," the judge responded, "I'm not saying it is" and added:

> "What did you do to consider the best interest of the children in this particular relationship where you had a person who was on SSI, living with the other individual? [¶] You have a history of sexual abuse, apparently, in this family of these children. And now you have at least something that would be considered out of the mainstream sexual relationship between two people, right?"

While the social worker agreed with the judge, she added that she spoke with Natalie and Andrew about how they felt. Initially, Natalie informed her that she did not want to live with petitioner because petitioner was a lesbian. The social worker asked Natalie why she felt that way. The social worker believed the father had imposed that view on Natalie. As of the dispositional hearing, the social worker reported, Natalie would like to live with petitioner. She would rather be with family than in a foster home. The judge questioned whether the social worker changed Natalie's view. The social worker denied trying to change Natalie's mind. The judge next questioned whether the social worker had asked Natalie "what her friends would say when she has two parents who were lesbians?" and "[w]hat she would tell them?" The social worker replied no to both questions.

The social worker did concede that it might be important to Natalie's mental stability and she could have discussed the issue of adjustment more with Natalie. However, that was why the social worker recommended the children and petitioner attend counseling. The judge pointed out counseling would come after placement under the social worker's plan. He then added, regarding the placement, "[into] [a]n environment for which she can be ridiculed at school from all her friends" and "in which she's expressed that she didn't want to be exposed . . . because of her moral upbringing by her father, apparently." The judge followed up his observation by asking if the social worker disagreed "with that moral upbringing by her father?" The social worker replied, "I'm

not here to judge other people or question their morals." When the judge next commented that the social worker acted "as if it was detrimental to Natalie because her father had imposed that particular moral value on her," the social worker retorted:

> "I feel it's more detrimental Natalie sleeping in her father's bed than living with her mother who is a lesbian."

When cross-examination by the father's counsel resumed, the social worker began to explain her understanding of her job. This led the judge to interrupt once again and ask the social worker what her job entails with respect to what she considers in the best interest of the children. The social worker explained the department believed that the children should be with a parent, if at all possible. It did not always start, however, with a presumption that it was best for a child to be with a noncustodial parent.

On cross-examination by petitioner's attorney, the social worker testified she had five years of social work experience and approximately 80 percent of the cases she dealt with involved substance abuse. This allowed her to recognize certain signs of particular drugs in people, in their lifestyle and how they maintain their homes. In the social worker's contacts with petitioner, she showed no signs of drug use in terms of her person, appearance, demeanor or home. Further, the social worker did not detect any evidence of mental disability or any behavioral aberration in petitioner's partner.

Following a brief recess, county counsel reported back to the court that the social worker asked petitioner's partner about her SSI benefits. The partner responded it was for her diabetes and physical disability.

The court then heard argument from counsel. In particular, the children's counsel disagreed with the placement recommendation but not because of "the mother's lifestyle" as "everyone seems to be focusing on here." Instead, the attorney counsel urged that in his opinion: there would be too many people living in petitioner's home; there was too little income to support those people; and there were too many unknowns about the adults living in the home regarding their personal problems and issues. Counsel in this regard

referred specifically to the CPS referrals on behalf of the partner's wards. The children's attorney nevertheless concluded by informing the court that it was his young clients' expressed desire to live with petitioner, if it were not possible to live with their father.

After the matter was submitted, the judge expressly concluded placement of the children with petitioner would be detrimental to their interests. The judge made numerous observations, detailed below, in reaching its conclusion. Thereafter, the court formally ordered the children removed from their father's custody, continued their foster care placement and ordered reunification services for each parent.

DISCUSSION

Appellant contends there was insufficient evidence to support the court's detriment finding under section 361.2. She adds the judge instead allowed his apparent bias against same sex domestic partnerships to govern his decision.

Section 361.2, subdivision (a) requires a court to place a dependent child with a noncustodial, nonoffending parent who requests custody, unless the placement would be detrimental to the child.[3] (*In re Luke M.* (2003) 107 Cal.App.4th 1412, 1422.) As at least one court has described section 361.2, such a parent is presumptively entitled to custody. (*In re Catherine H.* (2002) 102 Cal.App.4th 1284, 1292.) Indeed, several of our appellate courts have held because a nonoffending parent has a constitutionally

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[3] Section 361.2, subdivision (a) provides:

> "When a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child. If that parent requests custody, the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child."

protected interest in assuming physical custody, as well as a statutory right to do so, there must be clear and convincing evidence such a placement would be detrimental to the safety, protection, or physical or emotional well-being of the child before a court may properly refuse a parent's request. (*In re Isayah C.* (2004) 118 Cal.App.4th 684, 696; *In re Luke M., supra,* 107 Cal.App.4th at p. 1426; *In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1829.)

Here, we note in passing that although the judge made an express detriment finding, he repeatedly stated that the best interests of the children was the issue before him. We take this opportunity to clarify that although serving a child's best interests is a fundamental goal of California's dependency law (see § 202), the precise issue before the court was not whether placement with petitioner was in the children's best interest. Instead, the issue according to section 361.2 was whether there was evidence that placement with petitioner would be detrimental.

Because section 361.2, subdivision (c) requires that the court make findings, either in writing or orally on the record, as to the basis for its determination under section 361.2(a), we look to those findings to determine whether there was substantial evidence to support them. On review, we conclude there was not.

The Judge's Findings

The judge commenced by observing the status of petitioiner's household was questionable because the department provided an inadequate explanation of the CPS referrals as to the female ward of petitioner's partner. In the judge's estimation, the referrals should have caused the department concern.

Next, the judge expressed his concern that the dispositional report did not address petitioner's relationship with her partner nor did it explain that the adults named as living with petitioner were her partner and the partner's father who suffered from a terminal illness.

The judge then reiterated at length his concern that the department failed "to consider the impact on the children of placing them into this kind of a relationship," an apparent reference to petitioner's relationship with her partner. The judge explained:

> "[W]e're not here to determine whether or not we're discriminating against parents. We're here to determine what is the best interests of the children. And I feel we're putting the best interests of the children secondary to some rights that some people may feel they may have as parents.
>
> "Parents do have rights. But I think the only reason that the Court is intervening in this case is because of the issue of whether or not the best interests of the children are at stake here. And the Court really believes that the best interests of the children are at stake. And there was not an adequate consideration made into this situation. Especially when you had a child who had told the social worker that she did not want to enter or live in that household initially because she was opposed to the lifestyle of her mother."

Along the same lines, the judge criticized the department and the social worker for trying to change Natalie's mind. "That is not their job. I think the parents have a right to instill the moral values."

Moving on, the judge remarked:

> "[Y]ou look at this whole background and you see just a whole load of issues of sexual abuse, sex among the children, all these improprieties which are totally dysfunctional in a family. And we're going to take these poor children and put them into what is traditional another questionable family environment.
>
> "I mean, I don't care what the new generation is saying about we have to accept this. And you know what, I don't know that people have to accept it, especially children, when it's going to have a detrimental effect on their life and they've expressed a desire not, initially, to go into that type of environment. [¶] . . . [¶]
>
> "That's the whole reason we take children out of the -- take dependency issues in, is because of nontraditional families. It's a nontraditional issue. Whether or not they want to accept this -- the state wants to accept this as a traditional family, that's another issue. I don't think that is the issue before the Court.

"The issue before the Court is the best interest of the children."

The judge concluded by saying:

"I think we can cut out that issue of the relationship of the mother with her lesbian partner. But there are so many issues here that really trouble the Court placing these children in that type of environment. I certainly think it would be wrong for the Court to intervene in that way and do something like that."

Analysis

To a large extent, the judge denied petitioner placement based on his assumption that living in a home with petitioner and her partner would have a detrimental effect on the children's lives. However, missing from the record was any evidence to support the judge's assumption. In this regard, we observe a court cannot base its finding upon an unsubstantiated belief. (*In re Steve W.* (1990) 217 Cal.App.3d 10, 23.)

The judge's remarks further reveal he attempted to set aside "that issue of the relationship of the mother with her lesbian partner" as the children's attorney had suggested. However, the judge immediately appeared to back track with his comment "[b]ut there are so many issues here that really trouble the Court placing these children in **that type of environment**." (Emphasis added.)

Although we will assume the judge did attempt to look beyond the effect he assumed that living with petitioner and her partner would have on Natalie and Andrew, the only other consideration the judge specifically mentioned also did not support a detriment finding. The judge was obviously concerned that the department provided an inadequate explanation of the CPS referrals as to the female ward of the petitioner's partner. In particular, the judge was apparently unwilling to accept the social worker's representation that she did not go into the specifics of the one substantiated allegation while drafting the social study because it did not appear to pose a risk to the children. The social worker, who testified she did not recall the specifics of the substantiated allegation, did not have the CPS records with her. Nevertheless, this evidentiary

vacuum -- so to speak -- did not amount to evidence that placement with petitioner would be therefore detrimental to Natalie and Andrew.

Because the judge also made reference to the argument by the children's counsel when the judge stated he could "cut out" the issue in his mind about the children living with petitioner and her partner, we have also taken into account the points made by that attorney.[4] As previously mentioned, he argued there would be too many people living in petitioner's home; there was too little income to support those people; and there were too many unknowns about the adults living in the home regarding their personal problems and issues. Nevertheless, the factors cited by counsel would not have sustained the court's detriment finding.

As to the number of people in the home, we fail to see how that amounts to detriment. Certainly, there was adequate space for Natalie and Andrew. In addition, there would be no more children in petitioner's home than there had been in the father's and, unlike the situation in their father's home, Natalie and Andrew would be among the youngest children in petitioner's home. There was one more adult in petitioner's home and that individual was apparently terminally ill. However, once again, there was no showing of how that would impact Natalie and Andrew. Regarding the income issue, the law does not entitle the court to deny a parent physical custody due to a lack of employment or the lack of a separate residence. (*In re Danielle M.* (189) 215 Cal.App.3d 1267, 1270-1271.) Finally, "unknowns about the adults living in the home" do not amount to actual evidence of detriment.

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[4] By contrast, we note the father's arguments against placement, save his opposition to petitioner's "alternative lifestyle," apparently did not persuade the judge given that the court made no finding endorsing the father's claims.

We do not question the court's right to be concerned or otherwise believe that the department provided incomplete information regarding its placement recommendation. The department is an arm of the court (*In re Robert A.* (1992) 4 Cal.App.4th 174, 188) and if the court determines that the department has not satisfactorily performed a delegated task such as in this case, the court can take reasonably steps to rectify the problem (*ibid*).

However, the judge's solution here to find detriment was unreasonable and not supported by the record. The court properly could have directed the department to further investigate and provide the requisite information. If necessary, the court could have continued the matter for further hearing which would have been in furtherance the children's best interests and thus proper. (§ 352.) Here, the children were currently placed in separate foster homes and would prefer to live with petitioner rather than remain in foster care. Given that one of the goals of juvenile dependency is to preserve and strengthen the children's family ties whenever possible (§ 202, subd. (a)), for the court to continue the children's separation from one another let alone from family and simply deny petitioner's request, because it had unresolved concerns but no evidence that the recommended placement would be detrimental to the children, was prejudicial error.

DISPOSITION

Let a writ for extraordinary relief issue directing the juvenile court to vacate its detriment finding and order denying placement of the children with petitioner. The court is further directed to immediately grant petitioner's request for placement and order the children's placement with petitioner subject to family maintenance services. This opinion is final forthwith as to this court.